

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
HAWAIIAN ELECTRIC COMPANY, INC. )  
For Approval to Waive HECO's )  
Rule 13 to Allow HECO to Pay for )  
a Portion of the Underground )  
Conversion Cost for Item P0016255, )  
the Anti-Crime Street Lighting )  
Improvements - Waikiki, Part III - )  
Kalakaua Avenue Project. )

DOCKET NO. 04-0274

DECISION AND ORDER NO. 21518

Filed Dec. 23, 2004  
At 1 o'clock P.M.

Karen Higashi  
Chief Clerk of the Commission

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STATE OF HAWAII

ATTEST: A True Copy  
KAREN HIGASHI  
Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi

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DECISION AND ORDER

I.

Background

HAWAIIAN ELECTRIC COMPANY, INC. ("HECO") requests a waiver of its Rule 13 tariff ("Rule 13"), thereby allowing it to pay approximately \$21,733 to convert 7.2 kilovolt ("kV") and secondary overhead lines to 7.2 kV and secondary underground lines for the Anti-Crime Street Lighting Improvements - Waikiki, Part III - Kalakaua Avenue Project (the "Project").<sup>1</sup>

HECO served copies of its Application upon the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate"). The Consumer Advocate does not

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<sup>1</sup>HECO's Application for Approval of a Waiver of Rule 13, Verification, Attachments I to V, and Certificate of Service, filed on September 13, 2004 (collectively, the "Application"). HECO makes its request pursuant to its Tariff Sheet No. 1. See also Hawaii Revised Statutes ("HRS") §§ 269-16(b) and 269-12(b).

object to HECO's request to waive its Rule 13.<sup>2</sup> On November 29, 2004, HECO: (1) responded to the commission's information requests; and (2) submitted a draft copy of the Utility Agreement between HECO and the City and County of Honolulu ("City").

## II.

### HECO's Rule 13 and Tariff Sheet No. 1

HECO's Rule 13(D)(4) provides:

#### D. UNDERGROUND EXTENSIONS

\* \* \* \*

#### 4. Replacement of Overhead with Underground Facilities.

When mutually agreed upon by the customer or applicant and [HECO], overhead facilities will be replaced with underground facilities, provided the customer or applicant requesting the change makes a contribution of the estimated cost installed of the underground facilities less the estimated net salvage of the overhead facilities removed.

HECO's Tariff Sheet No. 1 states:

The rules and rate schedules set forth herein have been fixed by order of the Public Utilities Commission of the State of Hawaii and may not be abandoned, changed, modified or departed from without the prior approval of the Commission.<sup>3</sup>

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<sup>2</sup>Consumer Advocate's position statement, filed on October 12, 2004.

<sup>3</sup>See also HRS §§ 269-16(b) and 269-12(b).

### III.

#### The Project

The Project, initiated by the City in the Waikiki Special District, "is intended to increase the amount of street lighting for safety purposes and to promote a greater 'Hawaiian' sense of place at the entrance to Waikiki."<sup>4</sup> At the City's request, HECO intends to underground the existing 7.2 kV and secondary overhead lines currently located at the intersection of Kalakaua Avenue and McCully Street in Waikiki. These overhead lines primarily feed the street lights and traffic signals for the area.

HECO will install: (A) one (1) handhole; (B) approximately 155 feet of 2-2 inch and 1-3 inch ducts; (C) approximately 470 circuit feet of aluminum 7.2 kV cable and 225 circuit feet of aluminum triplex secondary cable; (D) one (1) three-phase 12 kV riser; and (E) one (1) single-phase 120/240V meter (i.e., traffic signals), to replace the meter being removed.<sup>5</sup>

In addition, HECO will remove: (A) approximately 150 circuit feet of single-phase and aerial secondary conductors; (B) approximately 85 circuit feet of triplex secondary conductor; (C) two (2) single-phase 120/240V meters; and (D) two wood poles, fifty (50) and forty-five (45) feet respectively.

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<sup>4</sup>HECO's Application, at 2.

<sup>5</sup>HECO states that "even though the City initially requested unmetered traffic signals, HECO is requiring the traffic signals to be metered." Id. at 3.

IV.

HECO's Request for Waiver

HECO explains that:

1. The Project's estimated cost is \$43,466. Of this amount, the City will contribute approximately \$21,733 in cash and in-kind contributions-in-aid-of-construction ("CIAC"), including contributions for change-over and removal costs.<sup>6</sup>

2. The Project's cost sharing is based on Revised Ordinances of Honolulu ("ROH") § 14-22.5(b)(2).<sup>7</sup> Specifically, "[t]he cost sharing for the overhead to underground conversion is based on a 50/50 cost sharing of an overhead to underground relocation."<sup>8</sup> HECO concurs with this cost sharing arrangement as the City's requested relocation work is within the boundaries of the Waikiki Special District.

3. "[A] project-specific waiver of Rule 13 is required for HECO to pay 50% of the total project cost . . . to convert the existing 7.2 kV and secondary overhead lines to

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<sup>6</sup>HECO states that the change-over and removal are non-capital items that are not included in its capital cost estimates provided to the commission. However, change-over and removal costs are included in the costs sharing between the City and HECO.

<sup>7</sup>ROH § 14-22.5(b)(2) provides that, with respect to the allocation of costs for underground public utility facilities located in a special design district, "[t]he difference of the costs of construction of an underground system and an overhead system in the removal, relocation, replacement or reconstruction of the existing overhead utility facilities within the public right-of-way shall be borne equally by the [C]ity and the respective utility company." See also HECO's response to PUC-IR-101; and Exhibit B (Revised) of the draft Utility Agreement, at 1, Paragraph 1(d).

<sup>8</sup>HECO's Application, at 5.

7.2 kV and secondary underground lines. The City will pay the remaining 50% of the total project cost."<sup>9</sup>

4. The Utility Agreement is contingent upon all required approvals from the commission, and is binding upon the receipt of such regulatory approval.<sup>10</sup>

The scheduled completion date is December 2004. The City, HECO notes, has already completed the installation of the underground infrastructure required for the overhead to underground conversion.

## V.

### Consumer Advocate's Position

At the outset, the Consumer Advocate notes that it "continues to support the filing of applications seeking Commission approval of any waiver of HECO's Rule 13 to determine the accumulated costs of the waivers and assess the impact of the waivers on HECO's rate base, resulting revenue requirements and general ratepayers."<sup>11</sup>

That said, the Consumer Advocate states:

1. The City, pursuant to Rule 13, would generally be responsible for paying for the entire \$43,466 cost of converting the subject lines from overhead to underground.

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<sup>9</sup>Id.

<sup>10</sup>Draft Utility Agreement, at 10, Paragraph 24. "Once the [Utility Agreement] has been executed between the City and HECO, a copy will be provided to the Commission and the Consumer Advocate." HECO's Application, at 5, footnote 3.

<sup>11</sup>Consumer Advocate's position statement, at 2.

2. The Project, however, is located within the Waikiki Special District. Thus, the cost of the requested relocation is subject to ROH § 14-22.5(b)(2).

3. Pursuant to ROH § 14-22.5(b)(2), the City and HECO will evenly share in the cost of the relocation (\$21,733 each).

4. A project-specific waiver of Rule 13 is required for HECO to contribute its share of the relocation cost.

The Consumer Advocate concludes that: (1) the proposed cost sharing between HECO and the City is consistent with ROH § 14-22.5(b)(2); and thus (2) it does not object to HECO's request to waive its Rule 13, thereby allowing HECO to pay approximately \$21,733 to convert the subject lines from overhead to underground.

Concomitantly, the Consumer Advocate requests that HECO submit a final cost report, following the Project's completion. The final cost report, the Consumer Advocate reasons, "will allow [it] to assess the impact of any cost over-runs, and more importantly accumulate the cost impacts of the Rule 13 waivers that have been granted by the Commission on HECO's future rate base, revenue requirements and general ratepayers."<sup>12</sup>

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<sup>12</sup>Id. at 4.

## VI.

### Discussion

HECO is the duly franchised provider of electric utility service on the island of Oahu.<sup>13</sup>

In *Citizens Util. Co. v. County of Kauai*, 72 Haw. 285, 814 P.2d 398 (1991), the Hawaii Supreme Court ("Court") held that a county ordinance that regulated the height of utility poles was preempted by the combination of HRS § 269-6 and a specific commission regulation governing the minimum requirements for pole height and the spacing of electrical lines. The Court stated:

It is clear that the legislature intended to reserve with the PUC the regulatory powers over public utilities, which was a matter of statewide concern to the legislature, and has preempted the power of the counties to regulate the height of utility poles. To allow the County to do so would be inconsistent with the intent of the statutory language expressly authorizing the PUC to supervise and regulate public utilities, which would include the height of utility poles.

As the [C]ourt held in *In re Application of Anamizu*, 52 Haw. 550, 481 P.2d 116 (1971), a municipal ordinance, which covers the same subject matter embraced within a State statute is invalid if the statute discloses an express or implied intent that the same shall be exclusive, or uniform in application throughout the State.

The general rule concerning functions of statewide interest and concern is that if the counties are not given specific authority to take over the function, the counties cannot thwart the State from performing its duty. *Kunimoto v. Kawakami*, 56 Haw. 582, 545 P.2d 684 (1976).

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<sup>13</sup>See, e.g., Act 48, Session Laws of Hawaii 1903, at 262 - 268 (HECO franchise); Act 23, Session Laws of Hawaii 1915, at 23 - 25 (HECO franchise); Act 134, Session Laws of Hawaii 1961, at 176 - 178 (HECO franchise); and HRS § 269-7.5(c). See also HECO's Application, at 2, Section I.



*Citizens Util. Co.*, 72 Haw. at 288 - 289, 814 P.2d at 400.<sup>14</sup> The Court, in effect, held that the county ordinance had entered into

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<sup>14</sup>See also *Richardson v. City and County of Honolulu*, 76 Haw. 46, 61 - 62, 868 P.2d 1193, 1208 - 1209 (1994) (discussing *Anamizu and Citizens Util. Co.*); and *Pacific Int'l Serv. Corp. v. Hurip*, 76 Haw. 209, 214 - 215, 873 P.2d 88, 93 - 94 (1994) (discussing *Richardson*, *Anamizu*, and *Citizens Util. Co.*).

In *Richardson*, the Court set forth the general principles governing preemption, as follows:

If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.

A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

Local legislation is "duplicative" of general law when it is coextensive therewith.

Similarly, local legislation is "contradictory" to general law when it is inimical thereto.

Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area, or when it has impliedly done so . . . .

*Richardson*, 76 Haw. at 60 - 61, 868 P.2d at 1207 - 1208 (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 16 Cal. Rptr.2d 215, 217 - 218, 844 P.2d 534, 536 - 537 (1993)) (citations omitted). See also *Pacific Int'l Serv. Corp.*, 76 Haw. at 215, 873 P.2d at 94 (quoting *Richardson* and *Sherwin-Williams Co.* and discussing the "comprehensive statutory scheme" test set forth in *Anamizu and Citizens Util. Co.*).

The Court, in *Richardson*, held:

In summary, a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law.

*Richardson*, 76 Haw. at 62, 868 P.2d at 1209. See also *Pacific Int'l Serv. Corp.*, 76 Haw. at 215, 873 P.2d at 94.

an area that was "fully occupied" by general State law. *Richardson v. City and County of Honolulu*, 76 Haw. at 62, n. 24, 868 P.2d at 1209, n. 24. See also id., 76 Haw. at 62, 868 P.2d at 1209 (the State law at issue in *Citizens Util. Co.* governed a substantive "universe," i.e., the global regulation of public utilities, whereas the relevant county ordinance addressed only a "galaxy" thereof -- utility pole regulation).

HRS chapter 269 governs the commission's regulation of public utilities, including electric utilities.

HRS § 269-6 provides in part:

**§269-6 General powers and duties.** The public utilities commission shall have the general supervision hereinafter set forth over all public utilities, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter. Included among the general powers of the commission is the authority to adopt rules pursuant to chapter 91 necessary for the purposes of this chapter.

HRS § 269-16 confers upon the commission ratemaking authority over public utilities. HRS § 269-16 also subjects a public utility's rates, fares, charges, classifications, schedules, rules, and practices to commission scrutiny. Other provisions of HRS chapter 269 also confer upon the commission comprehensive regulatory authority over public utilities.

In addition, Act 134, Session Laws of Hawaii 1961, states in part:

SECTION 1.

(c) The public utilities commission is hereby authorized and directed to assume all of the functions, powers and duties pertaining to it under the constitution and laws of the State in respect to its increased jurisdiction.

SECTION 2.

. . . . .  
(d) That no such franchise shall limit or be construed to limit the power of the public utilities commission of the State of Hawaii or any other officer or agency of the State of Hawaii[.]

. . . . .

SECTION 4. All rights granted in each, and every franchise aforementioned to install equipment in, on, above, along, or under **public rights of way** shall be further amended to read as follows:

Effective July 1, 1962, the company shall have the right to place, construct, erect, or otherwise build poles, wires, pipes, and other appurtenances in, on, above, along, or under **public rights of way** which right shall be exercised only upon the approval of the public utilities commission based upon its written findings that the proposed installation meets standards prescribed by the commission governing such installations; provided that the approval of the public utilities commission shall not be required with respect to such installations in federal aid highway rights of way.

Act 134, Session Laws of Hawaii 1961, at 177 - 178 (HECO's franchise) (boldface added).

HECO's Rule 13(D)(4) provides that, when mutually agreed upon by the customer or applicant and HECO, overhead electrical facilities will be replaced with underground facilities, provided that the customer or applicant bear the cost of converting the facilities from overhead to underground. Rule 13(D)(4) took effect in accordance with the commission's comprehensive regulatory authority over public utilities.

Conversely, ROH § 14-22.5(b)(2) provides that, with respect to the allocation of costs for underground public utility facilities located in special design district public

rights-of-way, "[t]he difference of the costs of construction of an underground system and an overhead system in the removal, relocation, replacement or reconstruction of the existing overhead utility facilities within the public right-of-way shall be borne equally by the [C]ity and the respective utility company."<sup>15</sup>

HECO affirmatively states that HRS §§ 46-76 and 46-77 do not apply to the proposed cost sharing arrangement,<sup>16</sup> and there is no evidence that HRS § 264-33 applies in this instance.<sup>17</sup> Indeed, HECO confirms that its proposed cost sharing arrangement is pursuant to ROH § 14-22.5.<sup>18</sup>

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<sup>15</sup>Enacted in 1978, see Attachment IV of HECO's Application, ROH § 14-22.5 took effect prior to the Court's 1991 decision in *Citizens Util. Co.*

In addition, although not referenced by HECO in its Application or its responses to the commission's information requests, the proposed cost sharing arrangement appears to also implicate ROH § 21-9.20-4. This provision states:

Notwithstanding any ordinance or regulation to the contrary, utility companies shall place their utility lines underground within any special district. The director may grant an exemption to utility lines based on the applicant's satisfactory justification that no other alternative will better achieve the district's purpose and objectives.

<sup>16</sup>See HECO's responses to PUC-IR-101 and PUC-IR-102.

<sup>17</sup>HRS §§ 46-76 and 46-77 govern the location and re-location of utility facilities in improvement districts, while HRS § 264-33 applies to the location and re-location of utility facilities at "any state highway or state or county federal-aid highway[.]"

<sup>18</sup>HECO's responses to PUC-IR-101 and PUC-IR-102. See also Exhibit B (Revised) of the draft Utility Agreement, at 1, Paragraph 1(d)(the cost of the re-location and underground conversion of HECO's utility facilities shall be borne as provided by ROH § 14-22.5).

Accordingly, the requirement that HECO pay for a portion of the costs of converting the subject lines from overhead to underground is inconsistent and conflicts with the commission's comprehensive regulatory authority over public utilities, including its authority over a utility's operations, rates, charges, rules, and practices.<sup>19</sup> Consequently, the commission finds that Rule 13(D)(4) preempts ROH § 14-22.5(b)(2), and HECO is not required to share in the undergrounding costs pursuant to ROH § 14-22.5(b)(2). Nonetheless, since HECO's share of the Project costs in this case will have a *de minimis* effect on ratepayers, if at all, the commission, at HECO's request, will waive Rule 13(D)(4). HECO, thus, may contribute up to \$21,733 to convert the 7.2 kV and secondary overhead lines to 7.2 kV and secondary underground lines.<sup>20</sup>

The commission will also adopt as reasonable the Consumer Advocate's request for a final cost report. Said report is due within thirty (30) days from the completion of the conversion of the subject lines from overhead to underground.

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<sup>19</sup>The commission previously informed the City Council that the authority to allocate the costs of underground utility lines is reserved to the commission. See written testimony on City Council Bill No. 44 (1998), dated April 21, 1998, for an Ordinance Establishing a Pilot Project to Underground Utilities in the Lanikai Area of Kailua.

<sup>20</sup>HECO will not be allowed to recover its contributions to the Project's cost from ratepayers, unless approval of such recovery is granted by the commission in a general rate increase proceeding.

VII.

Orders

THE COMMISSION ORDERS:

1. HECO's request to waive its Rule 13(D)(4) is approved. HECO may contribute up to \$21,733 to convert the 7.2 kV and secondary overhead lines to 7.2 kV and secondary underground lines as part of the Anti-Crime Street Lighting Improvements - Waikiki, Part III - Kalakaua Avenue Project.

2. Unless ordered otherwise, within thirty (30) days from the completion of the conversion of the subject lines from overhead to underground, HECO shall file a final cost report with the commission and serve two (2) copies upon the Consumer Advocate.

3. HECO shall conform to the commission's order noted in paragraph 2, above. The failure to adhere to the commission's order will constitute cause for the commission to void this Decision and Order, and may result in further regulatory action as authorized by law.

DONE at Honolulu, Hawaii DEC 23 2004.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By Wayne H. Kimura  
Wayne H. Kimura, Commissioner

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Michael Azama  
Michael Azama  
Commission Counsel

04-0274.cs

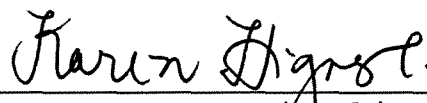
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21518 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
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Karen Higashi

DATED: DEC 23 2004